Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-615

SAMUEL H. SLOAN,

Petitioner,

-against-

WILLIAM H. MULLIGAN, Judge,
United States Court of Appeals
for the Second Circuit,

Respondent.

MOTION FOR LEAVE TO FILE A PETITION FOR A WRIT OF MANDAMUS

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IN THE
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No.

SAMUEL H. SLOAN,

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-against-

WILLIAM H. MULLIGAN, Judge,
United States Court of Appeals
for the Second Circuit,

Respondent.

MOTION FOR LEAVE TO FILE A PETITION FOR A WRIT OF MANDAMUS

PLEASE TAKE NOTICE that the undersigned hereby moves this Court pursuant to 28 U.S.C. §1651(a) and Rule 31 of the Supreme Court Rules for leave to file a petition for a writ of mandamus to compel the Hon. William H. Mulligan, a Judge of the United States Court of Appeals for the Second Circuit, to grant the undersigned leave to purchase a transcript of the oral argument of February 2, 1976 of the appeal of *Sloan v. Canadian Javelin Ltd. et al.*, Docket No. 75-7096.

DECISION BELOW

The unreported decision and order of the Hon. William H. Mulligan, a Judge of the United States Court of Appeals for the Second Circuit, dated October 27, 1976, which denied a motion for leave to move for the purchase of a transcript of the oral argument of the appeal of *Sloan v. Canadian Javelin Ltd. et al.*, Docket No. 75-7096, is included as Appendix A to this motion. This decision and order denied a motion for leave to file a motion for the right to purchase a transcript of the oral argument of that appeal. A copy of the motion for leave to file a motion and the affidavit and exhibit in support thereof is included as Appendix B to this motion. That motion sought leave to file a motion for an order granting the right to purchase a transcript of the oral argument of the appeal. A copy of the motion for the right to purchase a transcript and the affidavit and exhibits annexed thereto, for which leave to file was denied, is included as Appendix C to this motion.

JURISDICTION

The jurisdiction of this Court to issue a writ of mandamus is invoked under the All Writs Act, 28 U.S.C. §1651(a), inasmuch as the issuance of such a writ is necessary and appropriate in the aid of the jurisdiction of this court. See *Marbury v. Madison*, 5 U.S. [1 Cranch] 137 (1803); *Ex Parte Peru*, 318 U.S. 578, 582 (1943); *Chandler v. Judicial Council*, 398 U.S. 74, 86 (1970).

QUESTION PRESENTED

Does an appellant have the right to purchase a copy of the transcript of the oral argument of an appeal which has been argued before a United States Court of Appeals and will the United States Supreme Court issue a writ of mandamus to vindicate this right?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Article III, Section 2, paragraph 2 of the United States Constitution provides:

> "In all cases affecting ambassadors, other public ministers and consuls, and those in which a state shall be a party, the supreme court shall have original jurisdiction. In all the other cases before mentioned, the supreme court shall have appellate jurisdiction, both as to law and fact, with such exceptions, and under such regulations as the congress shall make."

The All Writs Act, 28 U.S.C. §1651(a) provides:

> "The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law."

RULES INVOLVED

The Rules of the United States Court of Appeals for the Second Circuit, § 0.14, provides:

> § 0.14. Quorum:
> (a) Two judges shall constitute a quorum. If, at any time, a quorum does not attend on any day appointed for holding a session of the court, any judge who does attend or, in the absence of any judge, the clerk may adjourn the court for such time as may be appropriate. Any judge attending when less than a quorum is present or at any time when the court is in recess may make any necessary procedural order touching any suit or proceeding preparatory to hearing or decision of the merits. (See Part II, §27(e).)

(b) Unless directed otherwise, a panel of the court shall consist of three judges. If a judge of a panel of the court which has heard argument or taken under submission any appeal, petition or motion shall be unable to continue with the consideration of such matter by reason of death, illness, resignation, or incapacity, or shall be relieved of such consideration at his request, the two remaining judges will determine the matter if they are in agreement and neither requests the designation of a third judge. If they are not in agreement or either requests such a designation, the Chief Judge will designate another circuit judge to sit in place of the judge who has become unable to continue or has been relieved. He shall advise the parties of such designation, but no further argument will be had or briefs received unless otherwise ordered.

The Rules of the United States Court of Appeals for the Second Circuit, Part II, §27(e) provides:

> (e) Motions to Be Determined by a Single Judge. (See Rule 27(b) and (c).) Motions for procedural relief will normally be determined by a single judge without oral argument. Notwithstanding the provision of §27(a) in regard to dismissals, a single judge may include in an order granting an appellant an extension of time a provision for dismissal of the appeal by the clerk in the event of a default. These include, without limitation, motions for extension of time to file records, briefs, appendices or other papers, or for permission to make late filing in the absence of stipulation; to dispense with printing; for assignment of counsel or transcription of the record at the expense of the United States in cases governed by 18 U.S.C. §3006A (which action shall be deemed to constitute

> the grant of leave to proceed in forma pauperis); for allowance of compensation and expenses under 18 U.S.C. §3006A; for assignment of counsel when a certificate of probable cause (see Rule 22) has been granted by the district court and for leave to proceed in forma pauperis in such cases; for leave to file a brief as amicus curiae (see Rule 20); for substitution (see Rule 43); for consolidation; to intervene or to add or drop parties; for a preference; or for postponement of the argument of an appeal. When the court is not in session, certain of the motions normally returnable before a panel as provided in subdivision (a) may be heard and decided by a single judge. Arrangements for such a hearing shall be made through the clerk.

STATEMENT OF THE CASE

In 1975 and 1976, the movant, Samuel H. Sloan ("Sloan"), perfected a series of related appeals to the United States Court of Appeals for the Second Circuit. The first of these was argued on September 26, 1975 before Judges Moore, Mulligan and Van Graafeiland and resulted in a decision reported as *Sloan v. S.E.C.*, 527 F.2d 11 (2d Cir. 1975), *cert. denied*, ——U.S.—— (June 14, 1976). At the time of the oral argument of that appeal, the same panel denied a motion by Sloan for a stay of proceedings before the Hon. Robert J. Ward which were then pending in the United States District Court for the Southern District of New York in the case of *S.E.C. v. Sloan*, 74 Civil 5729.

The next Sloan appeals scheduled for oral argument were appeals in three civil injunction actions brought by the Securities and Exchange Commission ("S.E.C."). These three appeals were summarily dismissed on January 7, 1976. See *S.E.C. v. Sloan*, 538 F.2d 313 (2d Cir. 1976);

S.E.C. v. Canadian Javelin Ltd., 538 F.2d 313 (2d Cir. 1976). A consolidated petition for a writ of certiorari in those cases is presently pending in this court as *Sloan v. S.E.C.*, Docket No. 76-365.

Sloan did not learn of the summary dismissal of those three appeals until January 27, 1976 at about 7:30 P.M., at which time he was in Iceland. He resolved immediately to return to the United States but could not do so the following day due to circumstances beyond his control. He then called the clerk's office of the United States Court of Appeals for the Second Circuit and requested a brief adjournment of the oral argument of *Sloan v. Canadian Javelin Ltd. et al.* Docket No. 75-7096, which had been scheduled for January 29, 1976, so that he could be present. As a result, an order was entered with the approval of the presiding judge, the Hon. William H. Mulligan, which adjourned the oral argument of the appeal until Monday, February 2, 1976. A copy of the order adjourning oral argument is included as Appendix D to this motion.

The order provided that the oral argument would be held on February 2, 1976 "on the prior condition that . . . appellant, Samuel H. Sloan, appear before the Hon. Robert J. Ward . . . for disposition of his contempt charge." Upon learning of this order, Sloan called the chambers of Judge Ward and scheduled an appearance in his court for the morning of February 2, 1976. Sloan then traveled from Iceland to the United States and appeared in Judge Ward's court on schedule, at which time Judge Ward remanded Sloan to the custody of the U.S. Marshal and then commenced a *de novo* hearing on the contempt charge.[1] Sloan requested an adjournment and that he be

1. Judge Ward originally adjudged Sloan to be in civil contempt ex parte and without a hearing on July 22, 1975. At that time, Sloan was outside of the jurisdiction of the Court since he was in Lynchburg, Virginia convalescing from an automobile accident which had resulted in his having two broken legs. Sloan continued to reside in Lynchburg, Virginia until December 20, 1975 when he went to Iceland.

allowed to proceed to the Court of Appeals on a different floor of the same courthouse to argue orally his scheduled appeal there. However, Judge Ward initially denied this request as follows:

> "The Court: Yes, and I have been in communication with the Court of Appeals and the way the matter has been left is you were to appear here before me first and purge yourself of contempt and at such time as I was satisfied that you had purged yourself of contempt I was to permit you to proceed to the Court of Appeals." Tr. p. 7

Judge Ward repeated this view on pages 12 and 20 of the same transcript. Fortunately, Judge Mulligan then called Judge Ward's courtroom and spoke to Judge Ward personally and shortly thereafter Judge Ward reversed himself by adjourning the hearing he was conducting and directed the U.S. Marshal to take Sloan to the United States Court of Appeals and permit him to argue his appeal there.

The above circumstances were all set forth in an affidavit by Sloan in support of a motion filed in the Court of Appeals to reinstate the three previously dismissed appeals, a copy of which can be found on pages 103a-107a of Appendix T to the petition for a writ of certiorari filed under Docket No. 76-365. During the oral argument which then took place before Judges Hays, Mulligan and Gurfein, with Judge Mulligan presiding, Judge Mulligan asked at least one question about the status of the contempt proceedings and otherwise the oral argument was concerned with the merits of the appeal which had been scheduled for argument. Thereafter, on February 6, 1976, with only two judges present under the procedures set forth in §0.14(b) of the Rules of the United States Court of Appeals for the Second Circuit, Judges Mulligan and Gurfein, acting as a quorum, summarily affirmed the judgment of the district court which dismissed the action. See *Sloan v. Canadian*

Javelin Ltd., 538 F.2d 313 (2d Cir. 1976). Sloan then filed a petition for a rehearing accompanied by a suggestion that the rehearing be in banc, which was denied, and thereafter filed a petition for a writ of certiorari in this court under Docket No. 75-1901.

Although a total of 48 respondents were listed in this petition for a writ of certiorari and a total of seventeen law firms had appeared on behalf of defendants when this case was before the district court, only two briefs for respondents were filed in the United States Supreme Court on behalf of a total of only 5 of the 48 respondents. Of the two respondents' briefs, one made no statement whatever about the facts of the case. The remaining brief was filed by Leonard Toboroff ("Toboroff") on behalf of two respondents which had been the only defendants that had appeared without the representation of a law firm when the case was pending before the district court.

As the affidavit included as Appendix C to this motion states, Mr. Toboroff is the cousin of one Michael Gardner,[2] the former proprietor of Gardner Securities, a now defunct securities brokerage firm, and Toboroff's representation of the securities brokerage firm of Chartered New England Corp. and its clearing agent F.S. Moseley, Estabrook, Inc. came about as a result of his familial relationship. When Sloan read the brief Toboroff had filed in the United States Supreme Court, he immediately wrote a letter dated August 8, 1976 to the Court of Appeals requesting that a transcript be made of the oral argument before that court. See Appendix A p. 6a herein. Sloan stated that the reason for his request was that "one of the briefs [filed in the United States Supreme Court] directly contradicts what the same attorney said at the oral

2. Whose conviction for interstate transportation of stolen securities was coincidentally affirmed by the United States Court of Appeals for the Second Circuit on October 22, 1976.

argument in the Court of Appeals.[3] For this reason, and because of arguments presented in my petition for a writ of certiorari, it is essential that I obtain a copy of the transcript so that it may be transmitted to the Supreme Court and so that I can cite to the transcript in a reply brief which I intend to file."

The Court of Appeals never gave Sloan a written reply to this letter. Sloan thereafter made a series of telephone calls to the clerk's office and eventually he was told that if he wanted a transcript to be made, he would have to file a motion. After Sloan had prepared a motion, he was told that the policy of the Court of Appeals was not to permit a transcript of the oral argument to be made for the benefit of litigants and that his motion could not be filed without obtaining, by motion, leave to file a motion for the transcript. This led Sloan to prepare a second motion for leave to file a motion which he filed. Meanwhile, on October 4, 1976, Sloan's petition for a writ of certiorari was denied by this Court.

On October 27, 1976, Sloan's motion for leave to file a motion was denied by Judge Mulligan, to whom the motion had been assigned apparently for the reason that he was the presiding judge on the panel which decided the appeal. Sloan now moves this Court for leave to file a petition for a writ of mandamus to compel Judge Mulligan to take appropriate measures to enable Sloan to obtain a transcript of the oral argument of the appeal.[4]

3. The appeal in the Court of Appeals was argued primarily by Michael G. Shannon, an associate of and apparently on behalf also of Mr. Toboroff. Mr. Shannon's name appeared below the words "of counsel" in the brief filed in this Court by Mr. Toboroff.

4. The practice of the Second Circuit, which is based upon §0.14(a) of the Rules of the Second Circuit and §27(e) supplementing Rule 27 of the Fed. R. App. P. is that "motions for procedural relief" can be decided by a single judge. Among those listed in §27(e) is a motion for "transcription of the record at the expense of the United States." From this it is reasonable to assume that a motion for the transcription of an oral argument at the expense of a litigant

REASONS FOR GRANTING THE MOTION

Simultaneous with filing the instant motion, movant is filing a motion for an extention, until after the instant motion is decided, of the time to file a petition for a rehearing from the denial of the petition for a writ of certiorari in 75-1901. If the motion for an extention of time is granted and Sloan ultimately obtains a transcript of the oral argument, he intends to include the transcript of the oral argument as an appendix to the petition for a rehearing.

However, even if the motion for an extention of time is denied, Sloan will continue to seek to obtain a copy of the transcript because, due to the unusual circumstances of the oral argument on February 2, 1976, what was said there may have a bearing on the outcome of other cases: in particular *Sloan v. S.E.C.*, Supreme Court Docket No. 76-365 and *S.E.C. v. Sloan*, Court of Appeals docket No. 75-6106, in which a petition for a rehearing has been pending for nearly five months from a decision reported as 535 F.2d 679 (2d Cir. 1976). The result of these cases may in turn affect the outcome of another appeal which was argued on October 13, 1976 before the Court of Appeals. *Sloan v. S.E.C.*, Docket No. 75-4087, and which is presently *sub judice*.

In short, due to the fact that a series of related cases were filed in the Court of Appeals, the possibility exists that a chain reaction might take place in which a case of seemingly peripheral significance affects the results of indirectly related cases in unexpected ways. The movant contends that to the extent possible the transcript of the

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willing to pay, such as Sloan, would be within the authority of a single judge to grant. If this assumption is not correct, then Judge Mulligan could at least grant Sloan's motion for leave to file a motion which would make it possible for Sloan to present this matter to a panel of three judges which Sloan otherwise cannot do.

oral argument of an appeal should be available for purchase by all litigants in all cases. The movant is in an appropriate position to assert this claim since he now has argued orally a total of seven appeals to the United States Court of Appeals for the Second Circuit and the question of what was said during the oral argument of an appeal has come up more than once. For example, in a letter to certain judges of the Court of Appeals dated October 18, 1976, a copy of which is included as Appendix E to this motion, Sloan expressed the view that statements made by counsel for the S.E.C., at an oral argument on October 13, 1976 foreclosed certain mootness claims made in a prior appeal by counsel for the S.E.C.

If, by refusing to permit Sloan to obtain a transcript of the oral argument of the appeal, Judge Mulligan had done something unusual in the Second Circuit or if his decision turned upon the particular facts of the case, Sloan might harbor the hope of obtaining the transcript of appeals in other cases argued by him in the Second Circuit. However, what Judge Mulligan did on October 27, 1976 appears to be directly in accord with the policies of the Second Circuit which is rarely if ever to permit litigants to obtain a transcript of the oral argument. Thus, unless the instant motion for leave to file a petition for a writ of mandamus is granted, the policies of the Second Circuit will be permitted to remain in effect and Sloan will be aggrieved as a result. It should be added that Sloan first raised the legal question at bar long ago. On October 29, 1974, a three judge panel of the United States Court of Appeals for the Second Circuit denied a motion by Sloan in *S.E.C. v. Sloan*, Docket No. 74-1436, which requested that a court stenographer be present and make a record of the oral argument of that appeal, which subsequently was scheduled for argument on January 7, 1976. At the time he filed that motion, Sloan was not aware that a tape recording is made of the oral argument in the Court of

Appeals in all cases as a matter of course and therefore the presence of a court stenographer is not necessary.

At this juncture, one point should be made clear. Occasionally, it happens in the United States Court of Appeals for the Second Circuit that both sides agree in advance of oral argument that they want a transcript to be made. In such cases the parties may prepare and sign a stipulation and if it is "so ordered" by a judge of the Court of Appeals, they may hire their own outside stenographer to be present in the courtroom and record the oral argument. However, transcripts prepared in this manner are not official and do not become part of the record of the case and therefore are not citable in the future course of the lawsuit. In the instant case, of course, Sloan wants a transcript for the primary purpose of demonstrating to this Court that certain concessions made by counsel for a respondent during the oral argument in the Court of Appeals foreclose contrary assertions made in a brief filed by that same counsel in this Court. Any document other than an official transcript of the oral argument would not be useful for that purpose.

There are two aspects to the question of whether the instant motion should be granted. The first is whether a person in Sloan's position has the right to a transcript of the oral argument of an appeal. The second is whether the issuance of a writ of mandamus is a necessary and appropriate means to vindicate this right, assuming it exists. It is appropriate to address the latter issue first.

The essential question is whether the type of case presented here falls within the narrow confines of the class of cases in which the issuance of a writ of mandamus is appropriate. The answer to that question is clearly affirmative. Under the principle established as a result of *Marbury v. Madison, supra,* a writ of mandamus may be issued by the United States Supreme Court only where

necessary or appropriate in aid of its jurisdiction. The case of *Sloan v. Canadian Javelin Ltd.* is subject to the jurisdiction of the United States Supreme Court and therefore this Court has the authority to issue a writ of mandamus. Another consideration is whether or not the objections by the party seeking the issuance of the writ could not be raised in an appeal or a petition for a writ of certiorari seeking review of a final judgment. *Will v. United States,* 389 U.S. 90, 96 (1967). Again, the answer is obvious since under no circumstances would a successful appeal or petition for a writ of certiorari filed in this Court to review the final judgment of a lower court, entitle a party to obtain the transcript of the oral argument of an appeal. In fact, the United States Court of Appeals for the Second Circuit issued a writ of mandamus in a similar case in *International Business Machines Corp. v. Edelstein,* 526 F.2d 37, 45 (2d Cir. 1975) when it directed a district court judge to accept certain papers for filing because otherwise those papers would not be available for appellate review.

Another consideration is "the unfortunate consequence of making a judge a litigant, obliged to obtain personal counsel, or leave his defense to one of the litigants before him." *Banker's Life and Cas. Co. v. Holland,* 346 U.S. 379, 384-385 (1953) quoting *Ex parte Fahey,* 332 U.S. 258, 260 (1947). However, there are certain situations in which there is no alternative but to make the judge a litigant. The instant case presents one of them. Sloan can litigate against Canadian Javelin Ltd. and the other respondents for as long as he desires, but regardless of how much relief he obtains from those parties, he will still not get a transcript of the oral argument of the appeal. Under the procedures in effect in the Second Circuit, the only person in the universe who may authorize the release of the transcript of the oral argument of an appeal is the judge who presided over the appeal. In this case, that is Judge Mulligan. With regard to the consequences of making Judge Mulligan a

litigant, it may fairly be stated that he knows as much about the law of mandamus as anybody, having participated in many cases where the issuance of a writ of mandamus was sought. Of course, Judge Mulligan is normally in the contrary position of being a member of a panel of judges which has before it the question of whether a writ of mandamus should be issued to a district court judge. However, there can be no doubt that Judge Mulligan is eminently qualified to respond to the instant motion if he choses to do so.

In short, there can be no doubt that mandamus is an appropriate remedy in a case of the type presented here. Therefore, the question remains of whether in the particular case presented here a writ should be issued. It is submitted that once again the answer is obvious. The importance of oral argument in the Second Circuit can hardly be underestimated. The Second Circuit is currently the only federal court of appeals which permits oral argument in every case before it. In "Appeals to the Second Circuit" prepared by the Committee on Federal Courts of the association of the Bar of the City of New York, p. 39, it is stated that in only 5% of the cases argued is the decision finally arrived at contrary to the impression after oral argument. The same text goes on to say, on page 41:

> "Although the facts are set forth in the brief, no reading of a brief can possibly convey to the judges the meanings and the emphasis which can be supplied by a well-delivered oral presentation. If appellants' counsel fails to give the judges an understanding of the facts, the Court will be less disposed to disturb the judgment of the lower court."

Not only is the oral argument important because of its potential for persuasion, but hundreds of cases in the Supreme Court and in the courts of appeals have been

decided on the basis of concessions and other statements made at oral argument. For two recent examples see *Hampton v. United States*, ———U.S.———, 48 L. Ed. 2d 113, 117 n. 3 (April 27, 1976) and *Kleppe v. New Mexico*, ——U.S.——, 49 L.Ed. 2d 34, 40 n. 3 (June 17, 1976).

Clearly, the oral argument is important. In addition a transcript could easily be made of every oral argument from the tape recordings which the Second Circuit makes of the argument of every appeal. In fact, a high percentage of all appeals argued in the Second Circuit is decided by a brief oral statement pursuant to §0.23 of theRules of the Second Circuit. Litigants are permitted to order transcripts of these brief oral statements as a matter of course. Why, then, cannot the transcript of the oral argument be ordered in the same manner?

Thus far, no answer to this question has been provided by anyone and certainly not by Judge Mulligan. By contrast, a transcript of the argument before the United States Supreme Court is made whenever there is a scheduled argument and these transcripts are often cited in decisions of this Court. No problems appear to result because of this practice. Indeed, it seems that the only oral proceedings at any level of the judicial system in the entire United States in which a transcript is never made is the oral argument before the United States Court of Appeals for the Second Circuit. Clearly, this situation is unfair to litigants such as Sloan and should not be permitted to continue.

In addition to contending that all litigants should have a right to obtain the transcript of the oral argument of an appeal in all cases, assuming it is physically possible for them to do so, the movant contends that there are compelling circumstances which require that he be permitted to purchase a copy of the transcript in this particular case. The compelling circumstances are set forth in Appendix C to this motion and therefore will not be repeated here.

CONCLUSION

The motion for leave to file a petition for a writ of mandamus should be granted.

Samuel H. Sloan
917 Old Trents Ferry Rd.
Lynchburg. Va. 24503

Dated: October 29, 1976

APPENDIX "A"

ORDER DATED OCTOBER 27, 1976 OF THE HON. WILLIAM H. MULLIGAN DENYING MOTION FOR LEAVE TO MOVE FOR PURCHASE OF A TRANSCRIPT OF ORAL ARGUMENT OF AN APPEAL

UNITED STATES COURT OF APPEALS SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the 27th day of October, one thousand nine hundred and seventy-six.

SAMUEL H. SLOAN,

Plaintiff-Appellant,

v.

CANADIAN JAVELIN, LTD., AMERICAN STOCK EXCHANGE, DOW JONES # CO., JOHN C. DOYLE, WILLIAM M. WISMER, LEE & MARTIN, STUART PINKERTON, BISON PETROLEUM & MINERALS LTD., PAVONIA CORP., JOHN BOUCHARD, CANADA PERMANENT TRUST CO., MIAMI HERALD, PICKANDS, MATHER & CO., BRIG. GEN. OMAR TORREJOS, WRIGHT ENGINEERS, LTD., BACHE & CO., INC., BOUCHARD & CO., BURNS BROS. & TRIMMINS, INC.,

CHARTERED NEW ENGLAND CORP., DAVIDSON PARTNERS, LTD., DONIMEK & DOMINEK, INC., DYER MAGUIRE DRETZ & CO., EDWARDS & HANLY LOEB, RHOADWS & CO., MERRILL, LYNCH PIERCE, FENNER & SMITH, F.S., MOSLY ESTABROOK, MULLER & CO., OSWALD DRINKWATER & GRAHAM, LTD., PRESSMAN, FROHLICH & FROST, INC., WEIS & BAER, INC., WOOD, WALKER & CO., INC.

Defendants-Appellees.

It is hereby ordered that the motion made herein by Samuel H. Sloan appellant by notice of motion dated October 19, 1976, for leave to move for the purchase of a transcript of oral argument of the appeal herein be and it hereby is denied.

s/William H. Mulligan
William H. Mulligan

APPENDIX "B"

MOTION FOR LEAVE TO FILE A MOTION FOR THE RIGHT TO PURCHASE A TRANSCRIPT OF THE ORAL ARGUMENT AND AFFIDAVIT AND EXHIBIT IN SUPPORT THEREOF.

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

SAMUEL H. SLOAN,

Plaintiff-Appellant,

-against-

CANADIAN JAVELIN LTD. et al.,

Defendants-Appellees.

PLEASE TAKE NOTICE that upon the annexed affidavit of Samuel H. Sloan sworn to the 19th day of October, 1976, and the proposed motion and the affidavit in support thereof, the undersigned hereby moves this Court for leave to file a motion for the right to purchase a transcript of the oral argument of this appeal.

Yours, etc.

s/Samuel H. Sloan
SAMUEL H. SLOAN

Dated: October 19, 1976

To: All Counsel

AFFIDAVIT OF SAMUEL H. SLOAN IN SUPPORT OF MOTION

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

SAMUEL H. SLOAN,

Plaintiff-Appellant,

-against-

CANADIAN JAVELIN LTD. et al,

Defendants-Appellees.

SAMUEL H. SLOAN, being duly sworn, deposes and says:

1. On August 8, 1976 I wrote a letter to the Clerk of this honorable Court for the purpose of ordering a transcript of the oral argument of this appeal. A copy of this letter is annexed hereto and marked Exhibit A. Thereafter, I was informed that I was requested to file a motion if I wanted to obtain a copy of the transcript. On October 15, 1976, after I had prepared my motion, I was informed by an employee in the clerk's office that due to the unusual nature of my request, I would have to file a motion for leave to file a motion to obtain the transcript. This is that motion. I am forwarding herewith to this Court a copy of my proposed motion for leave to purchase a copy of the transcript and I ask that it be filed if my motion for leave to file the motion to purchase a copy of the transcript is granted.

2. There seems to be an increasing tendency for the United States Supreme Court as well as for lower courts to place reliance on concessions and statements made by

attorneys during the course of the oral argument of an appeal. See e.g. *Hampton v. United States,* ——— U.S.———, 48 L. Ed. 2d 113, 117 n. 3 (April 27, 1976); *Kleppe v. New Mexico,* ———U.S.———, 49 L.Ed. 2d 34, 40 n. 3 (June 17, 1976). It is well established that concessions of this sort are binding on the attorneys who make them as well as the parties they represent. Indeed, the resolution of innumberable appeals has turned on precisely what it was that the attorneys said during the oral argument.

3. I understand that the United States Supreme Court routinely prepares a transcript of all oral arguments heard by that Court. This Court, however, does not do so and, in fact, it is apparently necessary for a party such as myself who desires to obtain a copy of the transcript to file a motion for leave to file a motion for the transcript, as I have done here. I will not, in this affidavit, go into the reasons why I think I should be permitted to obtain a copy of the transcript, since that is covered in the affidavit in support of the proposed motion which I enclose. For the purposes of the instant motion for leave to file a motion, I believe that it is sufficient to state that obviously circumstances sometimes exist where a litigant is entitled to the transcript of the oral argument of his appeal and consequently this motion for leave to file a motion should be granted. I would like to add that inasmuch as the clerk's office makes a tape recording of the oral argument of every appeal, I can perceive no reason why a transcript should not be available as of right in all cases. In any event, I believe that the instant motion for leave to file a motion should be granted. Further affiant sayeth not.

s/Samuel H. Sloan
SAMUEL H. SLOAN

Sworn to
October 19th, 1976

LETTER FROM SAMUEL H. SLOAN DATED AUGUST 8, 1976

Clerk,
United States Court of Appeals
for the Second Circuit
U.S. Courthouse
Foley Square
New York, New York 10007

Re: *Sloan v. Canadian Javelin Ltd.*
Dkt. No. 75-7096

Dear Sir:

I hereby order a copy of the transcript of the oral argument of the above entitled appeal. I request that this transcript be prepared on an expedited basis.

The argument was held in the Court of Appeals on February 2, 1976. I subsequently filed a petition for a writ of certiorari in the United States Supreme Court under docket no. 75-1901 seeking review of the decision thereafter rendered. Only two opposing counsel have filed a brief in opposition. However, one of the briefs directly contradicts what the same attorney said at the oral argument in the Court of Appeals. For this reason, and because of arguments presented in my petition for a writ of certiorari, it is essential that I obtain a copy of the transcript so that it may be transmitted to the Supreme Court and so that I can cite to the transcript in a reply brief which I intend to file.

Very truly yours,

s/Samuel H. Sloan
Samuel H. Sloan

SHS/ab

cc: Clerk, United States Supreme Court
Washington, D.C. 20539

Sullivan & Cromwell
48 Wall Street
New York, New York 10005

Leonard Toboroff
17 East 63rd Street
New York, New York 10021

APPENDIX "C"

MOTION FOR THE RIGHT TO PURCHASE A TRANSCRIPT AND AFFIDAVIT AND EXHIBITS IN SUPPORT THEREOF.

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

SAMUEL H. SLOAN,

Appellant,

-against-

CANADIAN JAVELIN LTD. et al,

Defendants-appellees.

PLEASE TAKE NOTICE that upon the annexed affidavit of Samuel H. Sloan sworn to the 19th day of October, 1976 the undersigned hereby moves this Court for an order granting the plaintiff-appellant the right to purchase a transcript of the oral argument of this appeal.

Yours, etc.

s/Samuel H. Sloan
Samuel H. Sloan
917 Old Trents' Feery Road
Lynchburg, Virginia 24503

Dated: October 19, 1976

To: All Counsel

AFFIDAVIT OF SAMUEL H. SLOAN IN SUPPORT OF MOTION

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

SAMUEL H. SLOAN,

Plaintiff-Appellant,

-against-

CANADIAN JAVELIN LTD., et al.,

Defendants-appellees.

SAMUEL H. SLOAN, being duly sworn, deposes and says:

1. I make this affidavit in support of a motion for an order granting me the right to purchase a transcript of the oral argument of this appeal. This appeal was argued orally on February 2, 1976. The judgment of the district court was affirmed. See *Sloan v. Canadian Javelin Ltd.*, 538 F. 2d 313 (2d Cir. 1976). On April 1, 1976 a petition for a rehearing and a suggestion that the rehearing be in banc was denied. On June 30, 1976 I filed a petition for a writ of certiorari in the United States Supreme Court under docket no. 75-1901. This petition for a writ of certiorari named 48 respondents. A total of seven attorneys, representing various respondents, filed a notice of appearance in the United States Supreme Court accompanied by a waiver of the right to file a brief in opposition. In addition, two briefs in opposition were filed.

2. The brief in opposition submitted to the United States

Supreme Court by respondent Chartered New England Corp. contained statements which I found to be totally untrue. Feeling I could demonstrate this by obtaining a copy of the transcript of the oral argument of this case on appeal, I wrote a letter to the clerk's office requesting the same. I stated that I wanted a copy of the transcript so that I could include it in my reply brief to my petition for a writ of certiorari so as to demonstrate the untruth and inconsistency of the statements made in the brief for Chartered New England Corp. After receiving no response to my letter, I called the clerk's office and spoke to Mr. Art Heller who told me that, unlike proceedings in the district court where a transcript of the proceedings is available to anyone willing and able to pay for it, oral arguments are not transcribed except on a showing of need and the tape recording which is made of all oral arguments is generally available only for the use of the judges. Mr. Heller further stated that the only way I could get a transcript of the oral argument was to make a motion. As a result, I am making the instant motion now.

3. The United States Supreme Court often cites the transcript of oral argument when it makes a decision. The reason I want the transcript here is that I am certain it will demonstrate the falsity of a number of statements made in the brief for respondent Chartered New England Corp. which has been filed in the United States Supreme Court and that it will also demonstrate that arguments made in that brief are foreclosed by concessions which were made during the argument before this Court. The reason I am certain of this is that I have a clear recollection of what was said during the oral argument. Moreover, armed with the transcript, there are remedies to obtain redress for the wrongs I have suffered because of misconduct and misrepresentations on the part of counsel for Chartered New England Corp.

4. In order to clearly explain what I am talking about, I

am attaching hereto as Exhibit A the brief for respondent Chartered New England Corp. In addition, I am attaching as Exhibit B the only other respondents' brief which has been filed in the United States Supreme Court in this case. I am also attaching as Exhibit C pages 3-4, 8-9 and 36-38 of my own petition for a writ of certiorari.

5. A reading of these three exhibits will clearly demonstrate a substantial factual dispute which, if resolved in my favor, would demonstrate that an injustice has been done in this case. In question 4 of the questions presented in my petition for a writ of certiorari, I challenge the propriety of the appearance of an adversary, one Michael G. Shannon, at the oral argument in the Court of Appeals. In response, the brief for respondent Chartered New England Corp., which has Mr. Shannon's name on the cover, states that my petition contains "outrageous and untrue personal accusations against one of Sloan's adversaries" (p. 4) and that "The *ad hominum* arguments addressed against Mr. Shannon are unfounded, incredulous, and indicative of the maniac and unsuccessful search of Sloan for error below." (p. 7).

6. From the vehemence of this argument, it should be obvious that if what I say in my petition is true and accurate as opposed to "outrageous," "unfounded" and "incredulous," not only would I be entitled to a redress of grievances but the matter might be appropriate for disciplinary proceedings in this Court. (The Supreme Court does not conduct its own disciplinary hearings but rather relies on other tribunals. See Supreme Court Rule 8.) Since a factual dispute is concerned, at least in part, with what was said at oral argument in this Court, many issues would be resolved and the interests of justice would be served if a transcript were made.

7. I would also like to take this opportunity to point out that the brief for respondent Chartered New England Corp. contains a number of factual misrepresentations which

should be obvious to the judges of this Court, even without the benefit of a transcript, but which would not be obvious to a justice of the United States Supreme Court. For example, in page 9 of my petition for a writ of certiorari I state that Mr. Shannon did not file a notice of appearance and did not indicate which client, if any, he was representing. Mr. Shannon's brief in opposition implies that my statement is entirely untrue and says (p. 7 n. 7) "a form submitted to the clerk properly identified Mr. Shannon." Anyone not familiar with the practices and procedures of this Court would, from reading this, conclude I was making a fictitious claim in my petition for a writ of certiorari and that Shannon had in fact filed a notice of appearance with proper service on me. However, this Court can determine from its own records that no notice of appearance was filed, either here or in the district court, by Mr. Shannon or by his law firm, Amen, Weisman & Butler. Apparently, what was submitted on Mr. Shannon's behalf was an argument form of the type annexed hereto and marked Exhibit D. It is possible, of course, that Mr. Shannon did submit such a form. However, he did not serve a copy on me nor was he required to. I am informed that these forms are kept in this Court by a Mr. Greenbaum, a court officer, until after the oral argument has been scheduled, and then are thrown away. It is obvious that the submission of one of these forms does not constitute an official court filing and the implication to the contrary in the brief for respondent Chartered New England Corp. is false.

8. I think it is noteworthy that certain abuses I am complaining of could not be repeated. Effective September 29, 1976, this Court amended Rule 46(d)(1) of its rules to state:

> "A notice of appearance must be filed in each case by counsel of record and, if different, by counsel who will argue the appeal, not later than the date of filing the brief on a form to be provided by the court."

9. This rule came into effect as the result of a court order dated September 14, 1976. My petition for a writ of certiorari was filed on June 30, 1976 and the questions presented were summarized in the U.S. Law Week for July 27, 1976. See 45 U.S.L.W. 3089. Thus it appears that this Court's rules may have been changed to meet the objection I have raised. In any event, as a result of this change in the court rules, there is a new form, a copy of which is annexed hereto and marked Exhibit E. Had the submission of this form been required at the time this appeal was heard, Mr. Shannon could not have argued in behalf of all of the defendants and I am convinced that this Court would have arrived at a different result and would have decided the appeal in my favor. Unfortunately, at the time this appeal was argued a gaping loophole existed in this Court's rules which has been closed by the recent rule change. At that time anybody could have, in effect, come off the street and argued the appeal and unless one of the judges or an adversary perceived the irregularity and objected, it would have gone unnoticed. In most appeals, this would not be likely to occur since the attorneys in most cases know each other. However, it happened here since I did not know Mr. Shannon at the time he presented oral argument. In a case where some seventeen law firms had appeared in the district court and where nine law firms had put their names on briefs filed in the Court of Appeals, I did not find this surprising. However, Mr. Shannon's brief in the Supreme Court implies that he properly identified himself as counsel for Chartered New England Corp. I believe that a transcript of the oral argument of this appeal will show that this was not the case.

10. Had Mr. Shannon stated at oral argument that he was appearing solely in behalf of Chartered New England Corp. I feel certain that I would have objected inasmuch as

I settled my litigation with Chartered New England Corp. in 1974. There were a total of three suits between myself and Chartered New England Corp. The first was *Sloan v. Chartered New England Corp.*, N.Y. Civil Court, Index No. 89078/1973 where I obtained a default judgment after no answer was filed. This default judgment was opened on the second attempt on condition that Chartered New England Corp. pay me the sum of $25. The second was *Chartered New England Corp. v. Sloan*, Supreme Court, N.Y. County, Index No. 18351/1973, which was started after Chartered New England Corp. decided not to interpose a counterclaim in the existing suit but rather to institute a new action in a different court. In that case, Chartered New England Corp. obtained a default judgment against me by the device of giving me only eight days notice of a motion for summary judgment rather than the ten required by CPLR 2214(b) plus the three additional days required by CPLR 2103(b)(2) since service was by mail. I then moved to vacate the default judgment. While that motion was pending (which was certain to be granted), Judge Bonsal dismissed the district court action which is the subject of the instant appeal.

11. At this point, with present or future litigation pending in three cases, I met with Leonard Toboroff, counsel for both Chartered New England Corp. and its clearing agent F.S. Moseley, Estabrook, Inc., and agreed to settle the litigation by the payment by me of $2000 in cash. The actual exchange of funds took place in June, 1974 in the offices of Chartered New England Corp. Present were myself, Mr. Toboroff, Mr. Milton Baumbach and Mr. Robert X. Scheinman, the latter two being officers of Chartered New England Corp. (a third officer would have been present were it not for a conflict of interest arising from a familial relationship—Mr. Toboroff is the cousin of Michael Gardner, an individual well known in the securities industry, which is how he came to be the attorney

on this case. Apparently, it was decided that Mr. Gardner would not be present during settlement discussions for this reason). After I handed Mr. Baumbach the $2000 in cash, we signed stipulations discontinuing the two state court cases with prejudice. Moreover, Mr. Toboroff agreed that he would not file a brief or otherwise oppose my prospective appeal to the United States Court of Appeals for the Second Circuit. Mr. Toboroff explained to Mr. Baumbach and Mr. Scheinman that the interests of Chartered New England Corp. were "protected" by the stipulations discontinuing the state court suits. He aiso stated that some of the largest law firms in New York City would be opposing me on the appeal. After the meeting was over, Mr. Toboroff told me confidentially that the reason Mr. Baumbach and Mr. Scheinman had accepted my offer of settlement was that the litigation was costing them so much that they were anxious to take any reasonable settlement offer in order to be spared further expense.

12. Once this background is understood it should be obvious that had Mr. Shannon stood up in the Court of Appeals on February 2, 1976 and stated that he was arguing the appeal solely in behalf of Chartered New England Corp., I would have protested vehemently in view of the prior settlements. It should be noted that in actions under the Securities Exchange Act of 1934, Section 28(a), 15 U.S.C. 78bb(a), precludes the recovery of all but "actual damages." See *Green v. Wolf Corp.* 406 F. 2d 291, 302-303 (2d Cir. 1968) *cert. denied*, 395 U.S. 977 (1969). cf. *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723 (1975). The only money which actually changed hands between myself and Chartered New England Corp. was the $2000 which I handed to Mr. Baumbach by way of settlement of a suit and that would not be recoverable in a securities fraud action. Thus, the discontinuance of the two state court suits *with prejudice* also ended the federal court litigation, a fact which Mr. Toboroff obviously recognized

when he explained to Mr. Baumbach and Mr. Scheinman the reason for which he would not oppose my appeal to the Second Circuit.

13. After Mr. Toboroff filed his brief in the United States Supreme Court, I called him to request an explanation for his actions in view of the circumstances set forth above. I also attempted to ask him what the basis was for many statements contained in his brief. Mr. Toboroff flatly refused to discuss the facts of this case with me and cut me off each time when I attempted to read from his brief statements which I told him I considered to be untrue. Mr. Toboroff stated that his only interest in this case was in getting a legal fee from his clients, Chartered New England Corp. and F.S. Moseley, Estabrook, Inc., and that he was refusing to discuss his Supreme Court filing or to defend anything he said in his brief.

14. My conversation with Mr. Toboroff reinforced my desire to obtain a transcript of the oral argument of this appeal, which I believe will demonstrate the utter falsity of many of the statements Mr. Toboroff makes in his brief. For example, page 2 of Mr. Toboroff's brief states:

> "On October 23, 1973 at a hearing on the motions to dismiss the first complaint, Sloan announced a third complaint was being prepared, and the District Court, Bonsal J. held the motions in abeyance, and permitted Sloan to prepare this third complaint."

15. This statement is totally untrue. Although an oral argument was held before Judge Bonsal in October, 1973 on motions by defendants Standard & Poor's Corp., American Stock Exchange and Canadian Javelin Ltd. to dismiss, I did not state at that time that I was preparing a third complaint, Judge Bonsal did not state that the motions were being held in abeyance and Judge Bonsal did

not permit me to prepare a third complaint. Actually, since I had filed a complaint only eleven days earlier, it is obviously unlikely that I would have been preparing an amended complaint at that point. However, a significant fact here is that not only are the statements made in the brief filed by Mr. Toboroff untrue, but neither he nor anyone else representing Chartered New England Corp. was present on October 23, 1973 and, in fact, Chartered New England Corp. had not been served and had not appeared in the action. Moreover, arguments for the motions to dismiss were presented by Neal Baron of the law firm of Booth & Baron in behalf of defendant Standard & Poor's Corp., by Michael J. Murphy of the law firm of Lord, Day & Lord in behalf of defendant American Stock Exchange and by Irving L. Golomb of the law firm of Diamond & Golomb in behalf of defendant Canadian Javelin Ltd. I am certain that Mr. Baron, Mr. Murphy and Mr. Golomb, none of whom are apparently any longer involved in this case, will all agree that the characterization by Mr. Toboroff of what took place on October 23, 1973 is totally untrue. Unfortunately, no stenographic record was made of the proceedings of October 23, 1973.

16. In my recent telephone conversation with Mr. Toboroff, I attempted to ask him where he got his information concerning the events he says took place on October 23, 1973. There has been no affidavit filed in this case which supports what Mr. Toboroff says in his brief and Judge Bonsal's decision makes no mention of an oral argument on October 23, 1973. However, as noted previously, Mr. Toboroff flatly refused to discuss the facts of this case with me.

17. The transcript of the oral argument of this appeal will show that Mr. Shannon, who, it now appears, was arguing solely in behalf of Mr. Toboroff and Chartered New England Corp., stated that he did not know what took

place in the oral proceedings before Judge Bonsal in October and November, 1973 and that this Court "must accept Judge Bonsal's representation of what occurred." It will also show that in response to a question from Judge Mulligan, Mr. Shannon conceded that my supposed 19 day lateness in filing an amended complaint could not form the basis for the dismissal of the action, thus foreclosing an argument made on page 5 of the brief filed in the Supreme Court. It will further show that in response to a question from Judge Gurfein, Mr. Shannon stated that my failure to appear in court for an oral argument on January 14, 1974 (after the defendants failed to give me 10 days notice of the motion, as required by Rule 9(c)(2) of the General Rules for the Southern District of New York) was "irrelevant" to Judge Bonsal's decision, thus foreclosing arguments made on pages 3 and 5 of his brief. In addition, it will show that many arguments made in the United States Supreme Court were not made in this Court and indeed could not have been made in this Court since they have no factual basis.

18. A detailed examination of the record of this action will show that virtually every factual representation made in the brief filed by Mr. Toboroff and Mr. Shannon is either untrue or vastly distorts and misrepresents the circumstances being set forth. Unfortunately, Mr. Toboroff and Mr. Shannon are undoubtedly aware that the United States Supreme Court customarily does not examine the record of a case prior to deciding whether to grant or deny certiorari. In order to dispose of the large number of cases filed in that court, the system depends upon the honesty and integrity of the attorneys appearing before it. For this reason, attorneys who have neither honesty nor integrity, such as Mr. Toboroff and Mr. Shannon, can frustrate the system and cause injury to a litigant such as myself. Under the principle that for every wrong there is a remedy, there must be some measures a person in my position can take to

obtain redress for grievances. The first step clearly is to obtain a transcript of the oral argument of this appeal. Therefore, I believe that this motion should be granted.

s/Samuel H. Sloan
SAMUEL H. SLOAN

Sworn to
October 19th, 1976

EXHIBIT A

IN THE

Supreme Court of the United States

October Term, 1975

No. 75-1901

SAMUEL H. SLOAN
Petitioner,
—against—
CANADIAN JAVELIN LTD.,

AMERICAN STOCK EXCHANGE, DOW JONES & CO. INC., JOHN C. DOYLE, WILLIAM M. WISMER, LEE & MARTIN, LEE & MARTIN, STEWART PINKERTON, STANDARD & POOR'S CORP., BISON PETROLEUM & MINERALS LTD., ROBERT BENOIT MAJOR, PAVONIA, S.A., JOHN BOUCHARD, CANADA PERMANENT TRUST CO., THE MIAMI HERALD, PICKANDS, MATHER & CO., WRIGHT ENGINEERS, LTD., TECHNICAL ECONOMISTS LTD., WATTS, GRIFFIS & MCQUAT LTD., JOSEPH R. SMALLWOOD, ANGLO AMERICAN CORP., PETER JEFFREYS, INSTITUTIONAL SERVICES (DEUTSCHLAND) GMBH, ENGINEERING SERVICES, LTD., OLIVER L. VARDY, A.I.S. RESOURCES LTD., WORLD MINING, MCGRAW-HILL INC., STEVEN L. GERARD, ARTHUR FOOTE, ROBERT DE LA, RAYMOND ARONSON, BACHE & CO., INC., BOUCHARD & CO., BURNS BROS. & TIMMINS INC., CHARTERED NEW ENGLAND CORP., D'AVIDSON PARTNERS LTD., DOMINICK & DOMINICK INC., DYER MAGUIRE DRITZ & CO., EDWARDS & HANLY, LOEB, RHOADES & CO., MERRILL LYNCH, PIERCE, FENNER & SMITH, INC., F. S. MOSELEY, ESTABROOK & CO., INC., MULLER & CO., OSWALD, DRINKWATER & GRAHAM, LTD., PRESSMAN, FROHLICH & FROST, INC., WEISS & BAER, INC., WOOD, WALISER & CO.,
Respondents.

BRIEF FOR RESPONDENTS CHARTERED NEW ENGLAND CORP. AND F. S. MOSELEY, ESTABROOK & CO., INC. IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

BEST COPY AVAILABLE

LEONARD TOBOROFF
17 East 63rd Street
New York, New York 10021
(212) 838-2323

Counsel for Respondents
CHARTERED NEW ENGLAND CORP. and

Of Counsel
MICHAEL G. SHANNON

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IN THE

Supreme Court of the United States

October Term, 1975

No. 75-1901

SAMUEL H. SLOAN
Petitioner,
—against—
CANADIAN JAVELIN LTD., et al
Respondents.

BRIEF FOR RESPONDENTS CHARTERED NEW ENGLAND CORP. AND F. S. MOSELEY, ESTABROOK & CO., INC. IN OPPOSITION

The petition of Samuel H. Sloan ("Sloan") seeks review of a decision of the United States Court of Appeals for the Second Circuit (appearing at A-1a of the Appendix annexed to the petition)* dated February 6, 1976 which affirmed under Fed. R. Civ. P. 41(b) the decision of a district court to dismiss all pending complaints and seeks review of the decisions dated April 1, 1976 denying a petition for rehearing and a suggestion that the rehearing be *en banc*. (A-3a, 4a)

Questions Presented[1]

1. Whether the Court of Appeals for the Second Circuit committed error in affirming the judgment of the District Court on the grounds of Rule 41(b) of the Federal Rules of Civil Procedure?

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* References A- are to the Appendix to the petition.

[1] As Petitioner's phrasing of the questions presented is inaccurate and in part premised on speculation and matters not in the record, the respondents restate the questions pursuant to Rule 40(3) of the Supreme Court Rules.

2. Whether the District Court abused its discretion in dismissing a "fourth" untimely complaint which did not comply with the Court's order and the Federal Rules of Civil Procedure?

Counter-Statement of the Case[2]

On September 4, 1973 Sloan filed his first complaint naming Respondent Canadian Javelin, its two principal officers and six others as defendants, purportedly alleging violations of the Securities and Exchange Act of 1934. Before the return date of motions to dismiss the complaint, Sloan filed a second complaint on October 12, 1973 which included the original defendants and twenty-four additional defendants. This second complaint purported to be brought under the Securities Act of 1933, the Securities Exchange Act of 1934, and Rules 10-b and 10(b)-5 thereunder.

On October 23, 1973 at a hearing on the motions to dismiss the first complaint, Sloan announced a third complaint was being prepared, and the District Court, Bonsal J. held the motions in abeyance, and permitted Sloan to prepare this third complaint.

In November, 1973, Sloan served the third complaint (which was never filed) bearing Civil Action numbers 73 Civ. 3801 and 73 Civ. 4403, naming thirty-two defendants. Motions to dismiss the various complaints were made. On November 19, 1973 Judge Bonsal heard argument with respect to the motions to dismiss the complaints, denied the motions without prejudice and granted Sloan permission to amend the complaint yet again, and directed that the final complaint be filed and served within twenty days, to wit, no later than December 10, 1973.

The fourth complaint was not filed or served within the prescribed period. This fourth complaint dated December

[2] As Petitioner's Statement of the Case omits the significant procedural occurrences prior to the complaint dated December 29, 1973, they are stated herein, pursuant to Rule 40(3) of the Supreme Court Rules.

29, 1973 named sixteen additional defendants for a new total of forty-eight defendants. Motions to dismiss were made[3] and a hearing was held on January 14, 1974. Despite Sloan's failure to appear at the hearing, Judge Bonsal reserved decision on the motions to dismiss and subsequently received two memoranda from Sloan in support of his complaint and in opposition to the motions.

In an eighteen page opinion (A-5a et. seq.) dated May 30, 1974, Judge Bonsal, on several grounds, dismissed all pending complaints with prejudice as to all but three defendants, and, as to those three, dismissed without prejudice. On June 11, 1974, the judgment so dismissing the complaints was entered. (A-12a)

On June 26, 1974, Sloan filed a notice of appeal. The appeal was not perfected by Sloan until over a year later, and on February 2, 1976 the appeal was argued before Circuit Judges Hays, Mulligan and Gurfein of the Court of Appeals for the Second Circuit. On February 6, 1976, the Court of Appeals affirmed the District Court holding that "Under all of the circumstances we find the dismissal to have been well within the discretion of the district court under Fed. R. Civ. P. 41(b), and so we affirm." (A-1a, 2a)

Sloan's petition for a rehearing and suggestion that the rehearing be *en banc* were denied on April 1, 1976. (A-3a, 4a)

Reasons for Denying The Writ

The decision that Sloan seeks to have this Court review represents the application of ordinary rules in an unexceptionable manner in an unusual case.

The Petition. The petition, though stating that it raises important issues which can be expected to arise frequently, admits that the "facts and circumstances present here are rather bizarre."[4] The petition, replete with rambling and

[3] Summarized in the District Court's opinion A-11a-14a.

[4] Petition at 11.

imagined allegations of denial of constitutional rights premised on the brevity of the Second Circuit's opinion, outrageous and untrue personal accusations against one of Sloan's adversaries, allegations premised on speculations outside of the record and omissions, seeks to disguise a most proper exercise of judicial discretion by the courts below, as error cognizable of this Court's review.

The only question involved herein is whether the District Court properly exercised its discretion in the admittedly "bizarre" facts and circumstances of this case. It is thus eminently clear that none of the reasons set forth in Rule 19(1) of the Supreme Court Rules for the granting of a petition for writ of certiorari are present in the petition, and the petition should be denied.

The District Court. It is well settled that a District Court has extensive discretion in dismissing a complaint for failure to prosecute. *E.g. Joseph Muller Corporation Zurich* v. *Societe Anonyme De Gerance Et D'Armement*, 508 F2d 812 (2d Cir. 1974); *Redac Project 6426 Inc.* v. *Allstate Insurance Company*, 412 F2d 1043 (2d Cir. 1969); *Schmidt* v. *Wallenuis Line*, 455 F2d 1088 (9th Cir. 1972). In exercising this discretion the District Court should consider all of the particular circumstances and the procedural history of the case. *E.g. Van Bronkhorst* v. *Safeco Corp.* 529 F2d 943 (9th Cir. 1976); *Securities and Exchange Commission* v. *Power Resources Corporation*, 495 F2d 297 (10th Cir. 1974); *Marshall* v. *Sielaff*, 492 F2d 917 (3rd Cir. 1974).

Although the Petition focuses heavily on an amended complaint dated December 29, 1973, it must be placed in its proper procedural context. In Judge Bonsal's opinion in the District Court, this complaint together with all of the facts and circumstances relevant to pending motions to dismiss, the deficiencies in the complaints, the failure of Sloan to comply with the Federal Rules of Civil Procedure and an order of the Court was carefully considered and reviewed. In this extensive opinion Judge Bonsal recites the

factors which amply demonstrate the propriety of his exercise of discretion in dismissing the complaints:

(1) the repeated service of amended or proposed complaints by Sloan, and the numerous and varied motions of the defendants to dismiss;

(2) the leave given to Sloan to file a final proper complaint within a prescribed time period;

(3) the failure of Sloan to comply with an order of the court and a consideration of Sloan's purported excuses;

(4) the failure of Sloan to appear on a motion return date;

(5) the attempt by Sloan to delay state court proceedings and the undue burden on the defendants;

(6) the experience of Sloan and his three prior opportunities to frame an adequate complaint, and the failure of the complaints to comply with the Federal Rules of Civil Procedure; and

(7) the futility in imposing a lesser sanction.

Thus, despite the myraid allegations of Sloan, it cannot be seriously maintained that the dismissal was an abuse of discretion under these particular facts and circumstances.

The Court of Appeals. Notwithstanding the imaginative conclusions of Sloan, the decision of the Court of Appeals presents no issue warranting this Court's review. The decision is not in conflict with previous decisions (e.g. *Redac Project 6426 Inc.* v. *Allstate Insurance Company*, 412 F2d 1043 (2d Cir. 1969); *Taub* v. *Hale*, 355 F2d 201 (2d Cir.) *cert. denied* 384 U.S. 1007 (1966); nor does it raise questions unresolved by this Court or conflicting with decisions of this Court (e.g. *Link* v. *Wabash*, 370 U.S. 626 (1962)); nor is the decision sanctioning a departure from

accepted and normal procedure or itself so departing (e.g. *Link* v. *Wabash,* supra; *Taub* v. *Hale,* supra).

In the Court of Appeals, the review of the dimissal under 41(b) of Fed. R. Civ. P. is limited to the question of whether the trial court abused its extensive discretion (E.g. *Marshall* v. *Sielaff,* 492 F2d 917 (3d Cir. 1974); *Redac Project 6426 Inc.* v. *Allstate Insurance Company,* 412 F2d 1043 (2d Cir. 1969), and in such review the Court should give considerable weight to the District Judge's determination, as the District Judge was in the best position to assess the circumstances. E.g. *Van Bronkhorst* v. *Safeco Corp.,* 529 F2d 943 (9th Cir. 1976).

The Court of Appeals was presented with all of Sloan's arguments,[5] both in the initial appeal and in Sloan's petition for rehearing *en banc,* and properly affirmed the decision of Judge Bonsal. The opinion of the Court of Appeals is most accurate. It concisely holds that "Under all the circumstances we find the dismissal to have been well within the discretion of the district court under Fed. R. Civ. P. 41(b), and so we affirm". (A-1a) Under this Rule the complaints could have been dismissed: a) for failure to prosecute; b) for failure to comply with the Federal Rules of Civil Procedure and c) for failure to comply with any order of the Court.[6]

We submit that in view of the particular facts of this case, where multiple grounds exist for the exercise of the

---

[5] The Petition at 37, in reference to the Petition for Rehearing states that "All of the arguments presented here were presented there."

[6] Sloan's argument that there was no order is frivilous. In his brief before the Court of Appeals, Sloan stated that he was "told he would have twenty days" (p. 10) and that there was a "statement of Judge Bonsal directing Sloan to file an amended complaint within twenty days" (p. 32). Futhermore Sloan cannot seriously argue that he could serve this "fourth" complaint without obtaining leave from the Court under Fed. R. Civ. P. 15(a). Thus Sloan would have this Court find the order of Judge Bonsal valid insofar as it granted leave for him to amend his complaint, but a nullity insofar as it placed any time limitation on that leave to amend.

discretion to dismiss under 41(b) Fed. R. Civ. P., where Sloan's failures were repeated, where there was full consideration of all of the circumstances below, it is beyond peradventure that the Court of Appeals was without error in holding that the District Court acted "well within" its discretion.

The Petition in its Questions Presented four through seven, merits, at most, a passing response. The *ad hominum* arguments addressed against Mr. Shannon are unfounded, incredulous and indicative of the maniac and unsuccessful search of Sloan for error below.[7]

The alleged invalidity of the Circuit Court's opinion due to its brevity and the presence of only two signatures similarly can be summarily treated. There was a full panel present at oral argument to consider Sloan's argument, and there is no requirement that all three participants sign the order.[8] *Cf* 28 USC § 46(d); *United States* v. *Allied Stevedoring,* 241 F2d 925, 927 (2d Cir.) *cert denied* 353 U.S. 984 (1957); *Tobin* v. *Ramey,* 206 F2d 505 (5th Cir.) *cert denied* 346 U.S. 925 (1953). All of Sloan's arguments were again repeated, considered and rejected by the panel in Sloan's petition for rehearing, and similarly rejected by the full court in the denial of the petition for rehearing *en banc.*

---

[7] Upon receipt of Sloan's petition for rehearing *en banc,* and in response to Sloan's accusation therein that Mr. Shannon was not admitted to the bar of the Second Circuit, a letter was sent to the Court of Appeals enclosing a copy of Mr. Shannon's certificate of admission. Sloan received a copy of this. Ignoring this, Sloan continues in his petition herein to attack Mr. Shannon's qualifications; and further asserts that Mr. Shannon failed to identify himself. This is, of course, untrue, as the brief before the Second Circuit and a form submitted to the clerk designating counsel for argument properly identified Mr. Shannon, as Sloan recognized in part in his petition for rehearing when he stated "according to the brief for appellees, Mr. Shannon represented Chartered New England Corp." (p. 10 thereof)

[8] Sloan admits Circuit Judge Hays was present at oral argument. Petition at 9.

8

Conclusion

For the foregoing reasons, we respectfully submit that the petition for writ of certiorari should be denied.

Respectfully submitted,

LEONARD TOBOROFF
Attorney for Respondents
Chartered New England
Corp. and F. S. Moseley,
Estabrook & Co., Inc.
17 East 63rd Street
New York, N. Y. 10021
(212) 838-2323

Of Counsel,
Michael G. Shannon
July 26, 1976

EXHIBIT B

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1901

SAMUEL H. SLOAN,

Petitioner,

—against—

CANADIAN JAVELIN LTD., ET AL.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

While petitioner claims otherwise, it is so patently obvious that the petition presents no substantial question cognizable under this Court's certiorari jurisdiction that we limit ourselves to noting that the only question properly presentable is whether the District Court abused its discretion in dismissing the complaint under Rule 41 of the Federal Rules of Civil Procedure for lack of prosecution and noncompliance with the Court's orders. That

exercise of discretion by the District Court complied in every respect with the guidelines laid down by this Court, *e.g., Link* v. *Wabash R.R.*, 370 U.S. 626, 629-33 (1962).

Since that question is certainly not one which this Court should consider on certiorari, we respectfully submit that the petition should be denied.

Respectfully submitted,

MARVIN SCHWARTZ
PAMELA S. DWYER
48 Wall Street
New York, New York 10005
Attorneys for Respondents Bache & Co., Inc. and The Miami Herald

SULLIVAN & CROMWELL
Of Counsel

LAWRENCE HANDELSMAN
61 Broadway
New York, New York 10004
Attorney for Respondent Loeb, Rhoades & Co.

STROOCK & STROOCK & LAVAN
Of Counsel

July 30, 1976

reported at CCH Fed. Sec. Law Rep. ¶ 94,579 [1973-74 transfer binder] and was not otherwise reported. A copy of this opinion is included as Appendix B to this petition. A copy of the subsequent order of the district court which denied the motion for relief from judgment, reargument and leave to file on amended complaint is included as appendix C to this petition.

JURISDICTION

The opinion of the United States Court of Appeals for the Second Circuit was entered on February 6, 1976. A petition for rehearing and suggestion that the rehearing be in banc was denied on April 1, 1976. Jurisdiction of this Court is involved under 28 U.S.C. Section 1254(1). The time within which to apply for a writ of certiorari to bring this proceeding before the Supreme Court for review is ninety (90) days from April 1, 1976 pursuant to 28 U.S.C. §2101(c).

QUESTIONS PRESENTED

1. Did the District Court, Bonsal, J., err in its decision to dismiss *sua sponte* the amended complaint with prejudice and without leave to replead as to all but three of the defendants and without prejudice as to the remaining three defendants?

2. Did the District Court abuse its discretion in denying the motion for relief from judgment, reargument and leave to file an amended complaint?

3. Did the United States Court of Appeals for the Second Circuit err in affirming the judgment of the District Court on the grounds of lack of prosecution?

4. Did the Court of Appeals err in receiving oral argument from an attorney who had not appeared in the District Court in this case, who had not filed a notice of appearance in the Court of Appeals, and who did not indicate which client, if any, he was representing?

5. Was the petitioner deprived of his due process rights in that only two judges participated in the decision of the Court of Appeals, the third having been called out of town due to an illness in his family?

6. Was the petitioner deprived of his Fifth Amendment due process rights to notice and the opportunity for a hearing as well as his First Amendment right to petition the government for a redress of grievances by the actions of the District Court and the Court of Appeals?

7. Does the two sentence summary disposition of a highly meritorious appeal such as this one deprive the appellant of his right to due process of law?

CONSTITUTIONAL PROVISIONS INVOLVED

The First Amendment, in pertinent part, states:

Congress shall make no law . . . abridging . . . the right . . . to petition the government for a redress of grievances.

The Fifth Amendment, in pertinent part, states:

"No person shall . . . be deprived of . . . liberty or property without due process of law . . . "

STATUTES AND RULES INVOLVED

28 U.S.C. §46(b) provides:

In each circuit the court may authorize the hearing and

complaint dated December 29, 1973 on any ground. However, in an eighteen (18) page opinion dated May 30, 1974, Judge Bonsal *sua sponte* dismissed all pending complaints with prejudice and without leave to replead as to all but three defendants and without prejudice as to the remaining three defendants. On June 11, 1974, a judgment was entered in favor of the defendants. A copy of this judgment is included as Appendix D to this petition. On June 17, 1974, Sloan's motion for relief from judgment, reargument and leave to file an amended complaint was summarily denied.

On June 26, 1974, a notice of appeal to the United States Court of Appeals for the Second Circuit was filed which sought review of the rulings of the District Court. This appeal was argued on February 2, 1976. Although a total of eighteen attorneys and law firms plus the Securities and Exchange Commission had appeared in the District Court, only two briefs for the appellees were filed in the Court of Appeals. One of these briefs was filed by counsel primarily for Canadian Javelin Ltd. and another defendant against whom Judge Bonsal had dismissed the action without prejudice. The other brief was filed by a conglomeration of either nine or eleven law firms representing either sixteen or eighteen defendants depending on whether one relied upon the inside or the outside of this brief. None of these law firms appeared to be taking principal responsibility for what was said in this brief.[3] However, the appeal was not argued by any of the many attorneys who had appeared in

3. The outside of the brief contains the names of nine law firms and attorneys and sixteen defendants. Two more defendants, who are said to be among those "joining in this brief" are listed on page 2 thereof. These two defendants were represented by the law firms of Cravath, Swaine & Moore and Lunney & Crocco in the District Court but the names of these law firms do not appear anywhere in the briefs filed in the Court of Appeals

this lawsuit in the District Court. Instead, the procedural aspects involved in this appeal were argued by one Michael G. Shannon, who had become a member of the bar of the Second Circuit shortly before oral argument and who had been a law school student at the time Judge Bonsal made his decision. A letter from Mr. Shannon following oral argument indicated an affiliation with the law firm of Amen, Weisman & Butler. This law firm had never appeared in either the District Court or in the Court of Appeals. Mr. Shannon did not indicate which particular defendant or defendants, if any, he was representing when he presented oral argument to the Court of Appeals.

On February 6, 1976, in a two sentence decision, the judgment of the District Court was affirmed by a two judge panel of the United States Court of Appeals. A third judge, Hays, who sat on the panel which heard oral argument, was called out of town due to an illness in his family and did not participate in making the decision.[4] On April 1, 1976 Sloan's petition for a rehearing and suggestion that the rehearing be in banc was denied without opinion. The petitioner now requests a writ of certiorari issue to review these decisions.

4. Although a space was left for his signature, Judge Hays did not sign the decision. Whether he concurred in the decision or participated informally in any way cannot be determined from the record. However, it is unlikely that he did so since he had been substituted in place of Judge Medina at the last moment after oral argument was adjourned for four days. Unlike the other two judges on the panel, Judge Hays remained silent throughout oral argument and probably had not had time to become familiar with this appeal. Thus, it is reasonable to conclude that this case was decided by two judges rather than the three required by 28 U.S.C. §46(b). This point was raised in Sloan's petition for rehearing and suggestion that the rehearing be in banc but was greeted with silence from the court.

One of the things Judge Bonsal did to cover up the invalidity of his decision was to put the words "appearances omitted" on the cover page of his opinion. No doubt he feared that the attorneys for defendants, which included some of the largest and most prestigious law firms in New York City, would be disconcerted at having their names publically associated with arguments they did not make and which, as has been demonstrated, were patently frivolous. The abysmal weakness of the position of the defendants on appeal is demonstrated by the fact that, when this cause came on to be argued in the Court of Appeals, it was not argued by one of the many competent and qualified attorneys who had appeared in the District Court but by a rank outsider who, when faced with questions propounded by members of the panel of judges hearing this appeal concerning the course of the proceedings below, repeatedly responded with the words "I don't know." Although this response evoked some caustic remarks from Judge Gurfein, it is clear from the decision which subsequently came down that the strategy of the appellee's succeeded. Clearly, Sloan was aggreived by the impropriety of the appearance of this attorney in the Court of Appeals. Superficially, the inadequacy of his opponent would seem to be to Sloan's advantage. However, in this case, had the appeal been argued by one of the attorneys who appeared in the District Court, several of whom sat in the back of the courtroom listening to the argument of the appeal, that attorney would no doubt have been forced to conceed the impropriety of the actions of the District Court and hence the judgment would have been reversed.

Another important question presented in this petition is whether a panel of two judges has the power to decide an appeal. It seems obvious that under 28 U.S.C. §46(b) a

panel of three judges is required to hear and determine an appeal except in the case of an appeal decided by an in banc court which is governed by 28 U.S.C. §§46(c) and 46(d).[17] Since by its nature this question is reviewable only by the Supreme Court of the United States, this petition for a writ of certiorari should be granted, and since it is obvious that a panel of only two judges cannot decide an appeal, the decision of the Court of Appeals should be vacated and the cause remanded to that court. It is insufficient to state that the opinion of two judges would have prevailed over anything a third might have decided for, as the court observed in *Berkshire Employees v. NLRB*, 121 F. 2d 235, 239 (3d Cir. 1941), there is no way by which the influence of one upon the others can be quantitatively measured.

Finally, the validity of §0.23 of the Rules of the Second Circuit by which the Court of Appeals permits itself to dispose of appeals summarily, as it did here, is appropriately questioned in this petition. In his appeal to the Court of Appéals, Sloan filed a 70 page brief, a 20 page reply brief, and a 15 page petition for rehearing and suggestion that the rehearing be in banc. All of the arguments presented here were presented there. For their part, the appellees filed briefs of 29 and 21 pages which cited 36 and 18 cases respectively. It should be obvious that the arguments presented were substantial and that this appeal is not of the type amenable to summary disposition. Thus, by deciding the appeal as it did, the Court of Appeals has in effect deprived Sloan of his statutory right to appeal as well as his constitutional right to due process of

17. Perhaps from a misreading of 28 U.S.C. §46(d) the Court of Appeals mistakenly concluded that a quorum of two judges was sufficient to determine an appeal. However, that sub-section only applies to paragraph (c) which deals with in banc determinations.

law, cf. *Taylor v. McKeithen* 407 U.S. 191, 194 (1972); *NLRB v. Amalgamated Clothing Workers* 430 F.2d 966, 972 (5th Cir. 1970).

CONCLUSION

For all of the reasons set forth above, this petition for a writ of certiorari should be granted.

Dated: June 23, 1976

Respectfully submitted,

Samuel H. Sloan
917 Old Trents Ferry Road
Lynchburg, Va. 24503

EXHIBIT D

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT
UNITED STATES COURTHOUSE
FOLEY SQUARE
NEW YORK 10007

DANIEL FUSARO
Clerk
CALENDAR NOTICE

IMPORTANT
COMPLETE AND RETURN
IMMEDIATELY

Docket # 75-7097
Calendar # S440

Date: 9/24/75

Re: Sloan v. Canadian Javelin Ltd., et. al.

The above entitled case has been added to the general calendar. Kindly complete this form and return to the Clerk's office immediately. Please note all that section of this court's rules concerning exhibits, copy of which has been enclosed.

1) Attorney who will argue case .....

2) Telephone number .....

3) Representing .....[ ] Appellant [ ] Appellee

4) This case has been before the court previously [ ] Yes [ ] No

5) If yes, give reference .....

6) Kindly set argument for a date other than those I observe as religious holy days .....

7) If any other dates will be inconvenient, state which and why .....

Because of the great number of cases on the calendar counsel is urged to limit argument to the minimum time needed to present the case. *The Court which reads all briefs in advance* will allow no more time than it thinks adequate for a proper presentation of the issues.

8) I request ..... minutes for argument.

If more than 20 minutes has been requested, persuasive reasons must be stated on other side.

9) If there are more than one appellant or appellee, state (on other side) what arrangements have been made for division of issues and time.

_____

(signature)

EXHIBIT E

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Calendar Number 266 Docket Number 76-4110

Samuel H. Sloan vs. S.E.C.

NOTICE OF APPEARANCE OF COUNSEL

The Clerk will enter my appearance as counsel for _____ [ ] Appellant [ ] Appellee
My name is _____
_____ The name of my firm, its address and telephone number are _____
I was admitted to the Bar of this court on _____

TIME REQUEST AND ARGUMENT INFORMATION

1) The attorney who will argue the appeal is _____. If different from above, the address and telephone number are _____
2) This case has been before the court previously [ ] Yes [ ] No
3) If yes, give reference by title and docket number _____
4) Kindly set argument for a date other than those I observe as religious holy days which are _____
5) If any other dates will be inconvenient, state which and why _____

6) I request _____ minutes for argument. If more than 20 minutes has been requested, persuasive reasons must be stated on other side.
7) If there are more than one appellant or appellee, state (on other side) the total amount of time requested and the division of time and issues agreed upon.

[ ] Multi-appellant [ ] Multi-appellee

RELATED CASE INFORMATION

To your knowledge and that of your co-counsel from whom you are to make inquiry:

8) Is there any case now pending in (i) this Court, (ii) the Supreme Court, or (iii) any other United States Court of Appeals which involves the same, substantially the same, similar or related issue(s)?
Yes _____ No _____
9) Is there any such case now pending in a District Court (i) within this Circuit, or (ii) in a Federal Administrative Agency which would likely be appealed to the Second Circuit?
Yes _____ No_____
10) Is there any case such as (8) or (9) in which judgment or order has been entered and the case is on its way to this Court by appeal, petition to enforce, review, deny?
Yes _____ No _____

If answer to 8), or 9), or 10), is yes, please give detailed information.

Number and Style of Related Case .....

Name of Court or Agency .....

Status of Appeal, (if any) .....

Other Status (if not appealed) .....

Please use and attach additional sheet if necessary to give further details.

Date

Signature

APPENDIX D

ORDER DATED JANUARY 26, 1976 ADJOURNING ORAL ARGUMENT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the twenty-eighth day of January, one thousand nine hundred and seventy-six.

Present: HON. WILLIAM H. MULLIGAN

SAMUEL H. SLOAN,

Plaintiff-Appellant,

v.

CANADIAN JAVELIN, LTD., et al.

Defendants-Appellees.

It is hereby ordered that the argument of the within appeal presently set for argument on Thursday, January 29, 1976, be and it hereby is adjourned to Monday, February 2, 1976, on the prior condition that between this date and Monday, February 2, 1976, appellant, Samuel H. Sloan, appear before Hon. Robert R. Ward, District Judge, United States Court for the Southern District of New York, for disposition of his contempt charge.

A. DANIEL FUSARO,
Clerk

APPENDIX E
LETTER DATED OCTOBER 18, 1976 FROM SAMUEL H. SLOAN TO THREE JUDGES OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

October 18, 1976

Hon. J. Edward Lombard
Hon. Sterry R. Waterman
Hon. Wilfred Feinberg
U.S. Court of Appeals
U.S. Courthouse
Foley Square
New York, New York 10007

Re: *S.E.C. v. Sloan*
Dkt. No. 75-6106

Dear Honorable Sirs:

On May 10, 1976 you dismissed as moot my appeal from an order adjudging me to be in contempt of court. See *S.E.C. v. Sloan*, 535 F. 2d 679, 680 (2d Cir. 1976). I thereafter filed a petition for a rehearing accompanied by a suggestion that the rehearing be en banc, which petition is still pending.

Since then, the S.E.C. has briefed and argued another appeal, *Sloan v. S.E.C.*, Dkt. No. 75-4087, argued October 13, 1976 before Medina, Anderson and Gurfein, CCJ. That is an appeal from an administrative order of the S.E.C. revoking my broker dealer registration and barring me for life from being associated with any broker or dealer.

During the oral argument of that appeal, counsel for the S.E.C. expressly stated that the Court of Appeals should consider the adjudication by the District Court that I was in

contempt of court as a basis for upholding the decision of the S.E.C. revoking my broker dealer registration, etc. At that point, I believe the S.E.C. is foreclosed from arguing that the question of the validity of the contempt adjudication is moot. In other words, the S.E.C. cannot have it both ways, claiming for the purpose of defeating my right to appeal in 75-6106 that the case is moot and yet claiming for the purpose of prevailing in 75-4087 that the contempt adjudication is a proper factor for this Court to consider.

The decision of the United States Supreme Court in *Sibron v. New York*, 392 U.S. 40, 57 (1968) clearly establishes the correctness of the point I am making. There, the Supreme Court held that an appeal does not become moot unless there is no possibility that a collateral legal consequence will arise as a result of the order from which the appeal is taken. Clearly, a possible collateral legal consequence has arisen here since the S.E.C. has argued that on the basis of the contempt adjudication, I should be barred for life from being associated with any broker or dealer.

I realize that the judges on the panel in the instant case were not in the courtroom on October 13, 1976 and therefore did not hear the attorney for the S.E.C. when he argued this point. However, I believe the Clerk of this Court keeps a tape recording of all oral arguments for the benefit of the judges of this Court and therefore it can be readily determined by you that what I am stating is correct.

For this reason, in addition to reasons previously stated, I believe that my petition for a rehearing should be granted and the question of the validity of the contempt adjudication should be decided on the merits.

Very truly yours,

s/Samuel H. Sloan
Samuel H. Sloan

cc: Frederick B. Wade
Securities & Exchange Commission
500 North Capitol Street
Washington, D.C. 20549